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Backgrounder

THE MEECH LAKE ACCORD: LINGUISTIC DUALITY AND THE DISTINCT SOCIETY

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TABLE OF CONTENTS

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INTRODUCTION

No clause of the 1987 Constitutional Accord has created more controversy than its first clause, which would insert into the Constitution Act, 1867 a new section 2 recognizing linguistic duality as a fundamental characteristic of Canada and also recognizing that Quebec constitutes within Canada a distinct society. The inclusion of the distinct society clause in the Accord responded to the most central of the five demands advanced by the province of Quebec. This clause must be read in conjunction with clause 16 of the Accord, the non-derogation clause.

For greater certainty both are set out in full below:

Interpretation

> 2.(1) The Constitution of Canada shall be interpreted in a manner consistent with
>
> (a) the recognition that the existence of French-speaking Canadians, centred in Quebec but also present elsewhere in Canada, and English-speaking Canadians, concentrated outside Quebec but also present in Quebec, constitutes a fundamental characteristic of Canada; and
>
> (b) the recognition that Quebec constitutes within Canada a distinct society.

Role of Parliament and Legislatures

> (2) The role of the Parliament of Canada and the provincial legislatures to preserve the fundamental characteristic of Canada referred to in paragraph (1)(a) is affirmed.

Role of Legislature and Government of Quebec

> (3) The role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec referred to in paragraph (1)(b) is affirmed.

Rights of Legislatures and Governments Preserved

> (4) Nothing in this section derogates from the powers, rights or privileges of Parliament or the Government of Canada, or of the legislatures or governments of the provinces, including any powers, rights or privileges relating to language.

Clause 16 of the Accord provides as follows:

Multicultural Heritage and Aboriginal Peoples

> 16. Nothing in section 2 of the Constitution Act, 1867 affects section 25 or 27 of the Canadian Charter of Rights and Freedoms, section 35 of the Constitution Act, 1982 or class 24 of section 91 of the Constitution Act, 1867.

The constitutional furor which has concentrated on clause 2 stems mainly from the lack of precise definition of the terms used, uncertainty about their effect on future legislation, and concern about their effect on our present Constitution and the entrenched Charter of Rights and Freedoms.

Witnesses appearing before committees studying the Accord and written commentaries have questioned what effect the recognition of linguistic duality as a fundamental characteristic of Canada and of Quebec as a distinct society might have on Quebec and the rest of Canada. Though the Accord states explicitly that this clause would not derogate from the powers of the federal parliament or provincial legislatures, doubt remains about how the courts would interpret it. Might they rule that clause 2, in spite of the non-derogation clause, would give Quebec, its legislature and/or government, the right to encroach on federal powers in order to preserve and promote the distinct identity of Quebec?

Some have taken the position that the linguistic duality-distinct society clause is only an interpretive clause, so that no powers flow from it. The drafters of the Accord must, however, have thought it

had the potential to affect rights protected under the Charter of Rights and Freedoms because they considered it necessary to include clause 16, which would exempt multicultural and aboriginal groups and the legislation which deals with them from the scope of clause 2.

This linguistic duality-distinct society clause could have been put in the preamble to the Constitution Act, 1867, in which case it would have been given little weight by the courts. Alternatively, it could have been made a substantive clause of the Constitution, in which case it would have greatly increased the legislative powers of Quebec. Its position, however, as an interpretive clause to be located as section 2 of the Constitution Act, 1867 creates uncertainty as to its real importance and effect.

A number of those who favour the inclusion of this clause in the Accord claim that it would simply recognize an existing sociological and demographic reality, which courts must take into consideration when they are dealing with legislation from Quebec. Others take a more activist view; Premier Bourassa claims that the clause would add to the legislative scope of the Province of Quebec.

The relationship between clause 2 and the rest of the Constitution, especially the Charter of Rights and Freedoms is a matter of some controversy. The judgment of Madam Justice Bertha Wilson of the Supreme Court of Canada in the Ontario Separate School Funding Reference Case (Bill 30)(1) states that certain parts of the Constitution are virtually inviolate and cannot be affected by the Charter. Would such reasoning be applied to the linguistic duality-distinct society clause?

The purpose of this paper is to set out the various arguments for and against clause 2. These arguments concentrate upon the relationship of this clause to the Charter of Rights and Freedoms. Its supporters claim that the clause would not adversely affect the equality rights in the Charter, while its opponents fear that it would jeopardize a number of hard-won Charter rights.

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(1) Re Bill 30 (Ontario Separate School Funding Reference) [1987] 1 S.C.R. 1148.

Tied in with this controversy is the existence and potential effect of the non-derogation clause (clause 16). This clause would specifically protect Canada's multicultural groups and native peoples, both identifiable groups with a cultural aspect, from any potentially negative effects of clause 2. Those who support the inclusion of clause 16 state that it refers only to collective rights, which would be the only kind of rights threatened by the linguistic duality-distinct society clause.

While clause 16 attempts to resolve future problems, it has prompted other groups to demand similar protection. Women's groups, especially, feel that women's rights, or at least sexual equality rights, should have been included in the other classes set out in the clause.

Some argue, of course, that, since Quebec was always legally bound by the Constitution, the Accord is really not necessary. Others argue that the Accord is an appropriate and long overdue answer to those in Quebec who voted "no" in the 1980 referendum and received promises of constitutional renewal from federal representatives campaigning in favour of that position. It is worth noting that the vast majority of those who comment negatively on the contents of the Meech Lake Accord do not find fault with its overall purpose, the reconciliation of Quebec to the Canadian Constitution.

ARGUMENTS BY SUPPORTERS OF PRESENT CLAUSE 2

It is important to remember that the Quebec round of constitutional talks was not intended to undertake a comprehensive reform of the federal system. It was, rather, the beginning of a new constitutional process with the single aim of "repatriating" Quebec. The successful result of the Quebec round would be the reconciliation of Quebec to the 1982 patriated Constitution and the Charter of Rights and Freedoms, after which, Canadians could move on to further discussion of constitutional reform for such matters as the fisheries, Senate reform and a possible constitutional definition of aboriginal rights. But first Quebec had to be successfully reconciled to the Constitution.

Many are willing to live with the Accord as drafted and are not alarmed by any possible adverse effect it might have on the Charter of Rights and Freedoms and the equality rights contained therein. While accepting that there might be some such effect, they consider that the overall purpose of the Accord is important enough to allow this. The Accord would commit all governments to a process of constitutional review and reform. It would also correct a problem which has existed since 1981, when patriation took place without the participation of Quebec. As this clause is crucial to the Accord, and as the Accord would be beneficial for Canadian unity and Canadian federalism, its supporters claim that the clause should not be amended.

Some even view the much-criticised imprecision of the clause as an advantage. It is argued that in a legal text a too precise definition may close more interpretation doors than it opens. For example, the courts when looking at a possible definition for "distinct society" can consult the conclusions of the Pépin-Robarts Commission, the Task Force on Canadian Unity. That Commission identified six factors of distinctiveness: history, language, civil code, common origins, sentiments and politics.

This is the position taken by Professor, now Senator, Gérald A. Beaudoin. He believes clause 2 describes a society recognized as distinct in the Quebec Act of 1774. Quebec is distinct with its civil law and its predominantly French culture and language. Since it is impossible to obtain absolute certainty and precision in such constitutional drafting, Senator Beaudoin believes final determination of the meaning and effect of this clause can be left to the courts.

The Constitution Acts of 1867, 1870 and 1982 contain extensive provisions dealing with language rights, religious rights and recognition of the civil law system of Quebec and the common law system elsewhere in Canada. Section 94 of the Constitution Act, 1867, which contemplated the possibility of uniform federal legislation for property and civil rights in some of the provinces, made no reference to Quebec, therefore recognizing its very different civil law system.

Supporters of clause 2 point out that our laws already reflect, sometimes implicitly and sometimes explicitly, "the existence of

French-speaking Canadians centred in Quebec but also present elsewhere in Canada and English-speaking Canadians concentrated outside Quebec but also present in Quebec," as well as the fact that Quebec society has certain distinctive features not found to the same extent, if at all, elsewhere in Canada.

Now, let us look more closely at what this clause of the Accord would accomplish, if adopted. According to supporters of clause 2, the Constitution would then recognize, in a specific interpretive provision, the fact of Canadian linguistic duality and the fact that Quebec constitutes a distinct society. This would affect not only the Charter, but the entire Constitution, including the division of powers. The preservation and promotion of the distinct character of Quebec would be a matter for the National Assembly and the government of Quebec. The preservation of the linguistic duality would be a matter for the central parliament and the provincial legislatures when exercising their exclusive jurisdictions.

The fact that the clause makes no reference to "promotion" of duality could mean, it is argued, that the provinces would be required to recognize only the linguistic rights which exist at the present time. By section 16(3) of the Charter the provinces are "allowed" but not "required" to promote the progression towards equal status for or use of French and English.

The rights of the Anglophone minority in Quebec would have to be defined in light of both linguistic duality and the distinct character of Quebec. Thus, the presence of the English fact in Quebec is specifically provided for in the wording of this clause of the Accord.

In Ford v. Attorney-General of Quebec,(2) in which the province of Quebec attempted to support its French-only signs law as a means of making French the linguistic face of Quebec, the Supreme Court of Canada was careful to speak of French as the "predominant" language of the province adding as well that "exclusivity for the French language ... does not reflect the reality of Quebec society." Quebec's "distinct society" would seem to be one in which English and French would have to co-exist.

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(2) [1988] 2 S.C.R. 712.

The clause describes itself as "interpretive" of the Constitution. Some of those who support it say that it is actually an affirmation of Canada's duality and Quebec's distinctiveness. It is of little direct legal significance itself. The important words used in clause 2(2) and 2(3) dealing with linguistic duality and distinct society are "role" and "affirmed." These would not be the appropriate words for conferring new powers; they seem rather to be words which recognize an existing situation. The clause, it is argued, would simply give the province of Quebec some additional leeway to derogate from the Charter of Rights and Freedoms. It might, along with section 1 of the Charter,(3) be used to tip the balance in favour of the constitutionality of laws passed by the legislature of Quebec.

In response to the concern that the promotion of a distinct society might involve abridging equality rights, especially gender equality rights in Quebec, supporters of the clause as now worded state unequivocally that it would not override the Charter of Rights. Any law passed by Quebec designed to promote the distinct society would have to comply with the Charter. Certain sections of the Constitution are indeed inherently discriminating, such as the provision for legislation in relation to denominational schools; these sections are not touched by the Charter.(4) Clause 2, however, is not inherently discriminatory according to this argument and would have to be used in compliance with the Charter.

A law that is inconsistent with a Charter right may be saved by section 1 of the Charter; this section permits a law to limit rights if that law is held to be within "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Thus, it might be argued that the linguistic duality-distinct society clause might be used to justify allowing a law to limit rights under section 1. A proportionality test, which would then be applied, would still require a court to balance the injury to a guaranteed civil liberty with the importance of the legislative purpose.

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(3) Professor Peter Hogg in a recent lecture to the Canadian Bar Association.

(4) Re Bill 30 (Ontario Separate School Funding Reference) [1987] 1 S.C.R. 1148.

In this indirect way, this clause of the Accord might give added leeway to Parliament or a legislature to derogate from the Charter. However, even without this clause, Quebec on the strength of history could make distinct society arguments to justify derogations of rights under section 1 of the Charter.

In conclusion, the supporters of clause 2 as now worded state that recognition of Quebec as a distinct society would not imply the abridgement of civil liberties. Also, in the case of women's rights, section 28 of the Charter, which guarantees rights equally to all male and female persons, affords additional protection from derogation.

ARGUMENTS BY OPPONENTS OF PRESENT CLAUSE 2

Supporters of the Accord argue that we must accept it with all its faults because of what it accomplishes; opponents of the Accord argue that we should be primarily concerned with ensuring that all its terms are defined and nothing left to speculation. Professor Ramsey Cook is one of the most Accord's outspoken critics. He states:

> It is important to establish at the outset that these proposals should be considered on their constitutional merits alone, and not on grounds that they may or may not achieve some extra-constitutional or political objective. By this I mean that the only justification for these proposals must be that they improve Canada's Constitution. It cannot be that they will "bring Quebec into the Constitution."(6)

It is argued that the terms used in the clause are vague and undefined, being sociological and psychological rather than legal. For example, what does "distinctiveness" mean when used in reference to a province? All provinces in Canada are considered distinct, otherwise we would have a unitary, rather than a federal, system of government. The Honourable Eugene Forsey, while not arguing against Quebec's distinctiveness, puts the case that his native Newfoundland also merits

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(6) Submission to the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord.

this status, as does New Brunswick, as the only province with a French-speaking minority amounting to nearly one-third of its total population. He notes, as well, that the French-speaking minority in New Brunswick is not a carbon copy of the Quebec Francophone community.

Former Senator Forsey also makes the point that while it seems the linguistic duality provision of clause 2 would protect the English minority in Quebec, this protection could possibly be overriden by the Quebec legislature's obligation to protect the "distinct society." Moreover, Forsey suggests that marriage and divorce, broadcasting, copyright, patents, telephones, railways, highway transport or atomic energy are possible areas that might be legislated upon should the Quebec government and legislature use the distinct society clause to the fullest extent.

The arguments presented by Senator Forsey conclude that, even though we certainly accept that a Quebec government would not try to move into these areas with the intent of jeopardizing the rights of a minority, the Constitution must give protection to minorities.

Professor Michael Bliss of the University of Toronto sums up this argument regarding the meaning of the "distinct society" clause and the possibility that it is a new head of power.

> Constitutional recognition of the Quebec government's responsibility to preserve and promote the province's "distinct society" either gives Quebec City a new mandate or it does not. If it does not, as ten of our first ministers maintain, then the language is purely symbolic ... Robert Bourassa and his advisors must be either knaves or fools to think Quebec makes major gains with this clause.
>
> But if the "distinct society" provision does entail a meaningful transfer of responsibility - as Mr. Bourassa certainly believes - then one provincial government has a special status in Canada. The responsibilities of federal members from that province are correspondingly diminished, and, in national governance, there is no longer one Canada.(7)

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(7) Submission to the Special Joint Committee of the Senate and House of Commons on the 1987 Constitutional Accord.

Former Liberal Cabinet Minister Donald Johnston, in a blistering attack on the Accord, used Premier Bourassa's own words to support both his own views and those of Professor Bliss. He quotes Premier Bourassa in an address before the National Assembly of Quebec:

> ... first of all we note that with the [recognition of a] distinct society, we are achieving a major gain, and one that is not merely symbolic because the country's entire constitution will from now on have to be interpreted to reflect this recognition. The French language constitutes one fundamental characteristic of our uniqueness, but it has other aspects, such as our culture, and our political, economic and legal institutions. As we have so often said, we did not want to define [all those aspects], precisely because we wanted to avoid reducing the Assemblée nationale's role in promoting Quebec's uniqueness ... It must be stressed that the whole Constitution, including the Charter, will be interpreted and applied in the light of the section on our distinct identity. This has a bearing on the exercise of legislative authority, and it will enable us to consolidate what has already been achieved and to gain new ground. Debates, Assemblée nationale, June 18, 1987.

In his brief to the Special Joint Committee on the 1987 Constitutional Accord, Mr. Johnston asks, "could the interpretation of the Constitution in a manner consistent with the recognition that Quebec constitutes within Canada a 'distinct society' provide Quebec with powers or authorities not available to other provinces?"

His answer is an unequivocal yes, based on the fact that much jurisdiction in Canada depends on an interpretation of the divisions of power set out in sections 91 and 92 of the Constitution Act, 1867 and of the federal residual power of peace, order and good government. He believes that if clause 2 were in force these interpretations might change in favour of Quebec. For example, jurisdiction over aeronautics is federal - based on an interpretation of the residual "peace, order and good government" section of the Constitution. Perhaps it could be argued that intra-provincial aviation and related infrastructure such as airports fall under Quebec jurisdiction on the basis of the promotion of the distinct society clause. This argument might be extended to apply to radio, television,

cable and pay T.V., all of which at the moment depend for their federal regulation upon the federal peace, order, and good government section.

As this rule of interpretation applies to every provision of the Constitution, the courts would be able to uphold any legislation or regulation by Quebec which supported the concept of a "distinct society" and did not derogate explicitly from the powers in sections 91 and 92 of the Constitution Act, 1867. This would broaden the fields of activity for which Quebec could legislate.

Johnston goes further and speculates that adoption of the clause might mean that the "national concerns" doctrine, which broadens federal powers, might be ruled by the courts as inapplicable to Quebec, while the "peace, order and good government" clause might be restricted to emergencies as far as Quebec was concerned. Over the years, court interpretations along this line would result in a considerable transfer of residual powers to Quebec and a special status for the province. The promotion of the distinct society could result, it is argued, in Quebec's having a special role in foreign affairs, economic policy, immigration, and social policies. Even civil liberties could be modified to distinguish Quebeckers from other Canadians.

Those who oppose the present wording of the linguistic duality-distinct society clause also argue that this clause, combined with clause 16 of the Accord, the non-derogation clause, might bring the Accord into conflict with the Charter of Rights and Freedoms.

Clause 16 of the Accord has been termed its "critical flaw." Since it explicitly omits to protect all Charter rights, it is argued that it may diminish the most fundamental rights protected by the Charter. For example, in its brief to the Special Joint Committee on the 1987 Constitutional Accord, the National Action Committee on the Status of Women concluded that "section 16 of the Accord does in fact put gender equality rights at risk" since they are not specifically mentioned in clause 16 and are therefore not protected from the ambit of the Accord.

The legal concerns regarding the linguistic duality-distinct society clause and clause 16 of the Accord were perhaps best expressed in the brief to the Special Joint Committee on the 1987 Constitutional Accord

presented by the Women's Legal Education and Action Fund. This brief referred to the reasoning of the Supreme Court of Canada in the Ontario Separate School Funding case, where it was decided that certain sections of the Constitution were immune to Charter review, and asked if sections of the Constitution which represent a fundamental constitutional compromise might be deemed immune also. Given the history of patriation, it is argued that the Accord represents such a compromise and legislation passed pursuant to it would not be touched by the equality or other sections of the Charter. The Women's Legal Education and Action Fund believes this argument is still sound, even if the linguistic duality-distinct society clause is deemed to be interpretive only and not a source of power. For example, it claims the clause could be cited to justify legislation restricting day care or women's access to job training or abortion, if such legislation could be shown to relate to language or culture.

There is a belief that the Accord, combined with the Bill 30 decision, has created not only a hierarchy of constitutional documents but also a hierarchy of rights, since clause 16 of the Accord would give preference to aboriginal and multicultural rights over equality rights.

Representatives of women's organizations from outside Quebec appearing before various parliamentary and legislative committees have argued that equality rights should be included in the non-derogation clause of the Accord (clause 16). This, they feel, would give them the same protection as a collectivity that the clause would give to aboriginal people and those of multicultural heritage. Is this really a solution? Is it good constitution making to set down interpretive rules and then exclude certain groups from their application?

Finally, those who support the Accord as worded state that, at the most, clause 2 would be used when determining whether a section 1 limitation on a right was reasonable and justifiable in a free and democratic society. Those who oppose clause 2, however, are concerned that not only would section 1 of the Charter be qualified by the linguistic duality and distinct society concepts but also by all the qualifiers in clause 16 of the Accord.

CONCLUSION

It is difficult to say what interpretation the courts would ultimately give to the linguistic duality-distinct society clause. It seems likely that, as an interpretive clause, it might add some leeway when a court was dealing with a decision involving section 1 of the Charter. Certainly, its inclusion in the Accord resulted from a political decision which will have legal consequences. Its supporters view its inclusion as a very modest accommodation to the constitutional demands advanced by Quebec over the years. Others believe that the insertion of clause 2 would result in too much uncertainty in the interpretation of the Constitution.